87-1420
No. .....

SUPREME COURT, U.S.
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In The
Supreme Court of the United States
October Term, 1987

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M-TRON INDUSTRIES, INC.,
Petitioner,
v.
ERNEST HILLEBRAND,
Respondent.

—o—

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

—o—

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February, 1988

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QUESTIONS PRESENTED

1. Did respondent establish a prima facie showing of age discrimination?

2. If so, does the establishment of a prima facie case preclude the granting of summary judgment, absent persuasive evidence that the asserted nondiscriminatory reasons for the adverse employment action are but a pretext for age discrimination?

LIST OF PARTIES AND RULE 28.1 LIST

The parties to the proceedings below were the petitioner, M-Tron Industries, Inc., and the respondent, Ernest Hillebrand.

The respondent before this Court is Ernest Hillebrand.

The petitioner before this Court is M-Tron Industries, Inc., a wholly-owned subsidiary of Lynch Corporation. Petitioner M-Tron Industries, Inc. has no subsidiaries or affiliates to list pursuant to Rule 28.1.

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v.
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The petitioner M-Tron Industries, Inc. respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, for the reasons stated below.

OPINIONS BELOW

The opinion of the United States District Court for the District of South Dakota, dated November 20, 1985, granting summary judgment to defendant (petitioner herein) has not been reported. It is reprinted in the appendix hereto, p. A-1, infra.

The opinion of the United States Court of Appeals for the Eighth Circuit, dated August 27, 1987, affirming in part, reversing in part and remanding the judgment below, is reported at 827 F.2d 363, and is reprinted in the appendix hereto, p. A-8, infra. The order of the Court of Appeals denying petitioner's petition for rehearing en banc is reprinted in the appendix hereto, p. A-20, infra.

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JURISDICTION

The judgment of the Court of Appeals was entered on August 27, 1987. A timely petition for rehearing en banc was denied by the Court of Appeals on November 18, 1987, and petitioner's motion for stay of mandate pending certiorari proceedings was denied by the Court of Appeals on December 3, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

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STATUTORY PROVISIONS INVOLVED

29 U.S.C. §623(a)(1). Prohibition of age discrimination; employer practices.

It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age.

Fed. R. Civ. P., Rule 56(c). Summary Judgment; motion and proceedings thereon.

The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

Fed. R. Civ. P., Rule 56(e). Form of affidavits; further testimony; defense required.

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere

allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

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STATEMENT OF THE CASE

I. INTRODUCTION

Petitioner is engaged in the manufacture, processing, and sale of crystals for electronic uses. Petitioner's business is essentially divided into two parts, manufactured product and purchased product, the latter being manufactured crystal which petitioner purchases from overseas, inspects, and sells to its customers.

In 1984, Petitioner's crystal manufacturing business was heavily dependent on contracts with a single customer, Delco Electronics, which accounted for an estimated 65-75% of petitioner's crystal manufacturing business. In May of 1984, petitioner was informed that it had lost its Delco business and would not be receiving any further contracts from Delco for crystal in the forthcoming year. Prior to its loss of the Delco contract, petitioner's manufactured crystal business, as a percentage of its total business volume, had steadily declined from a high of 100% in 1980 to a low of 49% in 1984, while the percentage of total business volume attributed to petitioner's purchased crystal business increased conversely from a low of 0% in 1980 to a high of 51% in 1984.

Respondent was employed by petitioner from 1975 through June, 1984, during which time he served in various manufacturing-related capacities, including Director of Manufacturing, Vice President of Manufacturing, Vice President of Operations, and Vice President - Manufacturing Manager. At the time of his termination in June 1984, respondent was serving in the capacity of Vice President - Manufacturing Operations and was also a corporate officer of petitioner, serving at the pleasure of petitioner's Board of Directors.

Subsequent to respondent's termination, eighty-nine (89) additional employees were laid off during the period of June, 1984 through March, 1985 due to the loss of the Delco contract and the overall decline in the manufactured crystal industry. At the time of respondent's termination in June, 1984, petitioner employed one-hundred and eighty-nine (189) employees in its manufactured crystal business. By the end of 1985, that number had shrunk to seventy-seven (77).

Respondent's position has remained vacant since his termination in June, 1984. Respondent's remaining job duties were transferred to David Rein, petitioner's Treasurer and Director of Finance and Administration. Rein was 40 years old at the time of the consolidation of job duties, and the assumption of respondent's remaining job duties increased Rein's actual workload by only a couple of hours per week.

II. FACTUAL SETTING

Respondent filed this action pursuant to the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C.

§§ 621-634 (1982), alleging that respondent discharged him because of his age. In answer to respondent's allegations, petitioner contended that respondent was terminated pursuant to a reduction in force necessitated by legitimate business considerations. Respondent thereupon challenged the business necessity and wisdom of petitioner's asserted rationale, contending that petitioner's proffered justification was but a pretext for age discrimination. This was the posture of the case when presented to the District Court for a ruling on petitioner's motion for summary judgment.

In the classical disparate treatment analysis established by this Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973), and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981), and as applied to age discrimination claims by the Eighth Circuit Court of Appeals, the plaintiff is able to establish a prima facie case by showing that: (1) he is within the protected age group; (2) he met applicable job qualifications; (3) despite these qualifications, he was discharged; and, (4) after he was discharged, the position remained open and the employer continued to seek applications from persons with similar qualifications, or the position was filled by a younger employee. *Cova v. Coca-Cola Bottling Co.*, 574 F.2d 958, 959 (8th Cir. 1978).

However, when a plaintiff's discharge arises in the context of a reduction in force, the courts, including the Eighth Circuit Court of Appeals, have applied a modified version of the *McDonnell Douglas/Burdine* standard. Thus, in evaluating an age discrimination claim in the reduction-in-force context, the plaintiff will be required to produce evidence that "age was a factor" in the discharge

decision in order to meet his or her prima facie burden. *See Holley v. Sanyo Mfg.*, 771 F.2d 1161, 1165-66 (8th Cir. 1985).

Once the plaintiff has satisfied this threshold burden, the defendant must come forward with evidence of its non-discriminatory justification for the adverse employment action. *Id.* at 1164. Finally, assuming the defendant has met its intermediate burden, the burden of production reverts back to the plaintiff and merges with the plaintiff's ultimate burden of persuasion to convince the trier of fact that the defendant's asserted rationale is but a pretext for discrimination. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981).

In the case at bar, petitioner articulated as its non-discriminatory reason for discharging respondent, a reduction in force resulting from its loss of the Delco contract and the overall decline in the manufactured crystal industry. Petitioner has never asserted that its reduction in force was necessitated by financial exigency; rather, petitioner has argued throughout these proceedings that the gradual decline in its manufactured crystal business, coupled with its loss of the Delco contract, justified a restructuring of its operations. Thus, petitioner argued successfully before the District Court that respondent was unable to meet his prima facie burden of establishing that his age was a factor in the discharge decision.

In reversing the District Court's ruling on the age discrimination count, the Court of Appeals held that since respondent claimed the reduction in force was itself a pretext for age discrimination, the legitimacy of petitioner's reduction in force became an issue at the prima

facie stage (p. A-11, infra). As a result, respondent was not required to establish that his age was a factor in respondent's decision to discharge him.[1] Reasoning that petitioner had failed to act according to an "objective plan" that "targeted positions" for reduction (p. A-18, infra), and that petitioner had failed to prove the existence of a "genuine business decline" as justification for the reduction in force (p. A-18, infra), the Court of Appeals held that respondent had established a prima facie case of age discrimination and, therefore, was entitled to a plenary trial on the merits (p. A-19, infra).

III. THE COURSE OF THIS LITIGATION

Respondent filed the instant action with the District Court on December 16, 1985. Thereafter, the parties engaged in extensive discovery, including the taking of depositions and the issuance of interrogatories, requests for admission, and requests for production of documents. The deadline for completion of discovery expired on September

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[1]Ironically, had petitioner simply proceeded under standard disparate treatment analysis, as opposed to the more exacting standards applicable to reduction in force cases, the Court of Appeals apparently would have concluded that respondent failed to establish a prima facie case, since he was never replaced by petitioner. The evidence before the District Court, and the designated record before the Court of Appeals, established irrefutably that assignment of respondent's former job duties to David Rein increased Rein's workload by "a couple of hours" per week. In a similar reduction in force case decided while petitioner's petition for rehearing en banc was pending, *Raschick v. Prudent Supply, Inc.*, 830 F.2d 1883 (8th Cir. 1987), the Eighth Circuit Court of Appeals held that the plaintiff was unable to establish a prima facie case of age discrimination because his former job duties were assigned to an existing employee who "used only a small portion of her time for this responsibility."

2, 1986, and petitioner filed a motion for summary judgment on October 1, 1986. The District Court granted petitioner's motion and entered its judgment of dismissal with prejudice on November 20, 1986.

Respondent thereupon appealed the decision of the District Court to the United States Court of Appeals for the Eighth Circuit. In a decision filed on August 7, 1987, a three-member panel reversed the decision of the District Court on the age discrimination count, while affirming the District Court's dismissal of the remaining state law counts.

Petitioner filed a petition for rehearing en banc, which was denied by the Court of Appeals on November 18, 1987. The order of the Court of Appeals indicated that four (4) Justices, Gibson, Fagg, Bowman, and Magill, would have granted the petition for rehearing en banc (p. A-20, infra). Petitioner thereafter unsuccessfully filed a motion to stay issuance of the mandate pending certiorari proceedings, and the mandate of the Court of Appeals issued December 4, 1987.

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REASONS FOR GRANTING THE WRIT

I.

The Court of Appeals' decision below (a) improperly alters the allocation and order of proof applicable to employment discrimination claims, and (b) conflicts with decisions of this Court and other Circuits.

The Court of Appeals has apparently determined that defendants in age discrimination actions involving reduc-

tions in force may no longer properly rely upon *Holley v. Sanyo Mfg.*, 771 F.2d 1161 (8th Cir. 1985), absent written evidence of an "objective plan" documenting the defendant's "genuine business decline," and identifying the "targeted positions" involved in the reduction in force (p. A-18, infra). Even in those cases wherein the defendant can muster such a showing, all the plaintiff need do to obtain the right to a jury trial is allege that the reduction in force was itself a pretext for age discrimination. The plaintiff thereby escapes his obligation of proving "age was a factor" in the discharge, a burden otherwise imposed under the *Holley* rationale.

Petitioner asserts that this new and uncharted course the Court of Appeals has now adopted misconstrues the allocation and order of proof applicable to age discrimination actions. Even assuming respondent has established a prima facie case of age discrimination, thereby shifting the burden of production to petitioner, the evidence before the District Court and the Court of Appeals established irrefutably that petitioner was suffering a significant decline in revenues from the manufacturing portion of its business. Whether revenues generated from other facets of petitioner's business ventures were likewise declining, or even increasing, is irrelevant and immaterial to petitioner's asserted rationale for discharging respondent. The evidence was also undisputed that respondent's area of expertise was in the manufacturing sector, which had been shrinking, both in terms of the size of petitioner's work force and the percentage of business volume generated, for at least five years.

The Court of Appeals decided in the face of this overwhelming evidence that petitioner's asserted rationale for

discharging respondent was pretextual in nature. Curiously, and petitioner would argue inappropriately, the Court of Appeals observed that it was only determining the issue of pretext within the confines of "the proper analytical framework of a prima facie case" (p. A-17, infra). In other words, in assessing the burden to be placed on respondent in meeting his prima facie burden, the Court of Appeals looked to petitioner's proffered justification for the discharge, found it to be pretextual, and proceeded to assign a lighter prima facie burden on respondent, thus eliminating entirely respondent's burden of establishing that his age was a factor in the discharge decision.

Even assuming the Court of Appeals was correct in concluding that petitioner's proffered justification was pretextual in nature, thus justifying the lightening of respondent's prima facie burden, establishing pretext involves more than simply presenting evidence that suggests the articulated reason might not be the true reason for the adverse action. Respondent must go further, he must prove discriminatory intent. *White v. Vathally,* 732 F.2d 1037, 1042-43 (1st Cir. 1984), *cert. denied,* 469 U.S. 933 (1984). To rule otherwise would impose a burden on petitioner to prove by a preponderance of the evidence the true reason for the adverse action, which is another way of saying it must prove the absence of discriminatory motive, a position specifically rejected by this Court in *Board of Trustees of Keene State College v. Sweeney,* 439 U.S. 24, 25 (1978).

Perhaps of greater significance to this Court, the Court of Appeals completed its circuitous route by im-

properly second-guessing petitioner's business judgment, and by imposing it's own standard of appropriate personnel practices. The Court of Appeals chastized petitioner for its failure to adopt an "objective plan" that "targeted positions" for elimination (p. A-18, infra). This is precisely the sort of judicial meddling addressed by this Court in *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 578 (1978), wherein it was observed:

> The dangers of embarking on a course such as that charted by the Court of Appeals here, where the court requires businesses to adopt what it perceives to be the 'best' hiring procedures, are nowhere more evident than in the record of this very case. . . . Courts are generally less competent than employers to restructure business practices, and unless mandated to do so by Congress they should not attempt it.

The Court of Appeals erroneously construed and applied the District Court's findings of fact and, in the process, disregarded controlling precedent in the Eighth Circuit. Whereas the District Court properly concluded that respondent was terminated pursuant to a bona fide reduction in force, the Court of Appeals improperly focused on the propriety of petitioner's business judgment and the adequacy of its purported claim of "dire economic straits" as justification for reducing its work force (p. A-18, infra). For the record, petitioner has never claimed that the reduction in force was motivated by business necessity; rather, petitioner has argued consistently throughout that it simply had no further need for respondent's services in light of the continuing decline in the manufacturing end of its business. Loss of the Delco contract was merely icing on the cake of a five-year decline in manufacturing. The

Court of Appeals has misconstrued the nature of petitioner's defense, interjecting an element of financial exigency that petitioner has never asserted, and then concluding that the reduction in force was pretextual due to the lack of compelling economic justification (p. A-18, infra).

Finally, at this stage of the proceedings, after the parties have admittedly engaged in "extensive discovery" (p. A-9, infra) and all discovery deadlines have long since passed, it matters not whether respondent has established a prima facie showing or whether petitioner has produced evidence of a legitimate, nondiscriminatory reason for respondent's termination. As this Court observed in *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1983):

> Where the defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case, whether the plaintiff really did so is no longer relevant. The district court has before it all the evidence it needs to decide whether 'the defendant intentionally discriminated against the plaintiff.' *Burdine, supra,* at 253.

While *Aikens* admittedly involved review following a trial on the merits, there is no compelling reason why its rationale should not be extended to summary judgment proceedings, especially where the parties have engaged in extensive discovery. Thus, even if respondent could establish that petitioner's articulated reasons for the discharge

were erroneous, mistaken, false, arbitrary, malicious, harsh, or any other pejorative adjective, short of unlawful discrimination, he still must somehow tie his discharge to his age. An arbitrary or unfair act in isolation, or in combination with any other inference respondent has been able to muster under the facts before this Court, simply does not present evidence upon which the trier of fact could base a finding of age discrimination.

Respondent has conceded his inability to establish a statistical pattern or practice of discrimination against older workers at petitioner's facilities, or an age-linked economic motive such as deprivation of pension benefits, or even dissimilar treatment of similarly-situated younger employees. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804-805 (1973) (discussing evidentiary methods of proving pretext). The decision of the Court of Appeals would simply infer that the discharge of an older worker, coupled with the assumption of his remaining duties by a younger worker, constitutes a triable issue of age discrimination. Case precedent of this Court and other Circuits dictates a contrary result.

The Court of Appeals has thus created a confusing precedent that will undoubtedly generate further confusion among the other Circuits. It is also a precedent at odds with the Court's rulings in *Furnco*, *Burdine*, and *Aikens*. Plenary consideration of this matter by the Court is essential to harmonize precedent in the area of employment discrimination.

II.

The decision below effectively eliminates the ability of a defendant employer in a discrimination action to obtain summary judgment, thus raising important and unresolved problems.

Implicit in the Court of Appeals' decision is the erroneous assumption that the establishment of a prima facie showing of age discrimination precludes a grant of summary judgment (pp. A-9-11, infra). Although the decision of the Court of Appeals was framed in terms of whether respondent had established a prima facie showing of age discrimination, the underlying assumption of the opinion is that once a prima facie showing is established, summary judgment will seldom, if ever, be appropriate in a discrimination action (pp. A-9-11; 19, infra).

However, as this Court noted in *Texas Department of Community Afafirs v. Burdine*, 450 U.S. 248, 253 (1981), "[t]he burden of establishing a prima facie case of disparate treatment is not onerous." This notion is further reinforced by the Court's observation that establishment of the prima facie case merely creates "a legally mandatory, rebuttable presumption." *Id.* at 254, n. 7.

Thus, where the defendant has met its burden of production by articulating a legitimate, nondiscriminatory reason for the action at issue, "the presumption drops from the case." *Id.* at 255, n. 10. Summary judgment should thereafter be available as a remedy in those cases where the plaintiff is unable to establish pretext. However, under the rationale of the Court of Appeals' decision, virtually every discharged employee over the age of forty (40) is automatically entitled to a jury trial under the

ADEA, so long as he or she can satisfy the minimum prima facie requirements. This is an absurd result, and one obviously not intended by Congress in the passage of the ADEA. It is a travesty of justice and a tragic waste of judicial resources to force such cases to trial. The Court of Appeal's ruling would nevertheless force such cases to trial as *a matter of law.*

With all due respect, the sanctity of the prima facie showing is not inviolate, and numerous courts have held that summary judgment may be granted even in the face of a prima facie showing. *See, e.g., Schuler v. Chronicle Broadcasting Co.*, 793 F.2d 1010 (9th Cir. 1986); *Meiri v. Dacon*, 759 F.2d 989 (2d Cir. 1985), *cert. denied*, 106 S.Ct. 91 (1985); *Parker v. Federal Nat'l Mortgage Assoc.*, 741 F.2d 975 (7th Cir. 1984); *Steckl v. Motorola, Inc.*, 703 F.2d 392 (9th Cir. 1983); *Pace v. Southern Ry. Sys.*, 701 F.2d 1388 (11th Cir. 1983), *cert. denied*, 464 U.S. 1018 (1983); *Lovelace v. Sherwin-Williams Co.*, 681 F.2d 230 (4th Cir. 1982); *Simmons v. McGuffey Nursing Home*, 619 F.2d 369 (5th Cir. 1980); *Dale v. Chicago Tribune Co.*, 40 Fair Empl. Prac. Cas. (BNA) 1667 (N.D. Ill. 1985), *aff'd*, 797 F.2d 458 (7th Cir. 1986), *cert. denied*, 107 S.Ct. 954 (1987); *Husbands v. Econo Therm Energy Sys. Corp.*, 650 F. Supp. 294 (D. Minn. 1986); *Matson v. Cargill, Inc.*, 618 F. Supp. 278 (D. Minn. 1985); *Nicholson v. Western Elec. Co.*, 555 F. Supp. 3 (M.D.N.C. 1982),*aff'd*, 701 F.2d 167 (4th Cir. 1983); *Doby v. Jones Laughlin Steel, Inc.*, 624 F. Supp. 874 (W.D. Pa. 1985); *Keller v. Bluemle*, 571 F. Supp. 364 (E.D. Pa. 1983), *aff'd*, 735 F.2d 1349 (3d Cir. 1984); *Pierce v. New Process Co.*, 580 F. Supp. 1543 (W.D. Pa. 1984), *aff'd*, 749 F.2d 27 (3d Cir. 1984).

While it is true that summary judgment is an extraordinary remedy to be granted sparingly and with some degree of caution, it should not be viewed as a disfavored "short cut" to be used only in those rare situations wherein the plaintiff has utterly failed to establish a prima facie showing. As recently noted by this Court in *Celotex Corp. v. Catrett,* 477 U.S. 317, 106 S.Ct. 2548, 2555 (1986):

> Rule 56 must be construed with . . . regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis.

Petitioner concedes that there are factual issues in dispute before this Court; however, to say there are factual issue in dispute merely begs the question. This will nearly always be the case, especially in the context of employment discrimination. However, "none of this means that trial courts or reviewing courts should treat discrimination differently from other ultimate questions of fact. Nor should they make their inquiry even more difficult by applying legal rules which were devised to govern 'the basic allocation of burdens and order of presentation of proof.'" *Aikens,* 460 U.S. at 716 (citation omitted).

Summary judgment is properly denied only when the factual disputes involve genuine issues of material fact. "For purposes of Rule 56, an issue is material if its resolution will determine the outcome." W. Schwarzer, *Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact,* 99 F.R.D. 465, 480 (1984).

"Materiality for purposes of Rule 56, therefore, has a meaning different from that in other contexts such as under the securities laws. An issue is not material simply because it *may* affect the outcome. It is material only if it must inevitably be decided." *Id.* (emphasis in original) (footnote omitted). In light of respondent's ultimate burden of establishing intentional discrimination on the basis of his age, it is immaterial whether respondent's termination was pursuant to a reduction in force, or whether, as respondent contends, his termination was separate and apart from any actual reduction in force during the period in question. Resolution of this factual dispute simply has no bearing on the ultimate question of whether respondent was a victim of intentional age discrimination.

The purported "evidence" of pretext upon which the Court of Appeals relied in reversing the District Court is nothing more than an attack upon the business propriety and necessity of petitioner's decision to reduce its work force, as well as the manner in which that objective was accomplished (p. A-18, infra). In an effort to buttress this obviously vulnerable reasoning, the Court of Appeals also cited to two comments as possible "direct" evidence of age discrimination: (1) Marty Kiousis' alleged reference to respondent as "a gray-haired old man" at a banquet several years previous; and, (2) an indirect statement attributed to Kiousis by respondent's counsel in which Kiousis agreed that respondent had "outlived his usefulness" in a business sense (p. A-15, infra).

For the record, resepondent does not even contend the former comment evidences age bias, (Hillebrand depo., p. 115, LL. 15-23), whereas the latter comment was ac-

tually posed by respondent's counsel during the deposition of Kiousis, and arose in the context of Kiousis's attempt to explain the relationship between respondent's discharge and the decline in petitioner's manufactured crystal business (Kiousis Depo., p. 78, LL. 16-25). Neither comment, alone or in tandem, raises a triable issue of fact, for no reasonable jury could conclude such comments constitute direct, or even circumstantial evidence of age bias.

Summary judgment under Fed. R. Civ. P., Rule 56, will only be granted where there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). Any inferences to be drawn from the facts must be viewed in the light most favorable to the party opposing the motion, and should there be any reasonable doubt as to the existence of a genuine issue of a material fact, summary judgment must be denied. However, the plain language of Rule 56(c) and (e) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. Without a showing of specific facts to support this burden, summary judgment must be granted. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 2552-53 (1986).

Moreover, the non-moving party in a summary judgment proceeding must present persuasive, not merely conflicting evidence, in order to create a genuine issue of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). Respondent's evidence is neither convincing

nor persuasive, and there is no reason to believe a trial on the merits will make one shred of difference.

The decision of the Court of Appeals is in conflict with decisions of this Court and other Circuits regarding the availability of summary judgment, especially where the plaintiff has succeeded in making a prima facie showing. The Court of Appeals plainly erred in failing to apply the principles of *Celotex* and *Liberty Lobby*, and by placing employment discrimination cases on a preferential footing nowhere sanctioned by law or legal precedent. Lower courts need guidance from this Court as to the significance of the prima facie showing in a summary judgment proceeding arising in the context of employment discrimination.

———o———

CONCLUSION

For these various reasons, this petition for certriorari should be granted. If the decision of the Court of Appeals is allowed to stand, defendants in age discrimination reduction in force settings will be required to prove the absence of a discriminatory motive, and will be deprived of the benefit of summary judgment in all cases wherein the plaintiff can muster a bare prima facie showing. Petitioner respectfully urges this Court to reverse the decision of the Court of Appeals, thereby affirming the decision of the District Court in dismissing respondent's age claim.

Respectfully submitted,

M-Tron Industries, Inc.,
Petitioner,

Timothy D. Loudon
Berens & Tate, P.C.
9317 Binney Street
Omaha, NE 68134
402/571-1355

Dated this 16th day of February, 1988.

APPENDIX

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

ERNEST HILLEBRAND,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	CIV 85-4267
M-TRON INDUSTRIES, INC., a South Dakota Corporation,	)	
	)	
	)	
Defendant.	)	
	)	

APPEARANCES:

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Mr. Steven M. Johnson
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Yankton, SD 57078

MEMORANDUM OPINION
AND
ORDER

(Filed November 19, 1986)

Defendant M-Tron Industries is a South Dakota corporation engaged in the manufacture, purchase, sale and

distribution of electronic components and products. Plaintiff was a management level employee of defendant. On June 12, 1984 plaintiff, who was 60 years old, was disdischarged. He then filed this action alleging that his discharge was illegal because it violated (1) the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq.;* (2) an implied duty to deal in good faith; and (3) a statutorily presumed one-year contract under S.D.C.L. § 60-1-3. Plaintiff raised a fourth ground during argument which was not pled—that plaintiff was discharged in violation of the by-laws of the corporation.

Defendant now moves for summary judgment. Summary judgment shall be granted only "if the pleadings, depositions, answer to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. Rule Civ. Pro. 56(c). Accordingly, "all facts are viewed in the light most favorable to the party opposing the motion, giving that party the benefit of all reasonable inferences to be drawn from the facts." *Portis v. Folk Construction Co.,* 694 F.2d 520, 522 (8th Cir. 1982). Nevertheless, when a motion for summary judgment is made and supported as provided in Rule 56(c), an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided under the rule, must set forth specific facts showing that there is a genuine issue for trial. Fed. Rule Civ. Pro. 56(e).

I. ADEA

Defendant moves the Court for summary judgment on the ADEA count on the ground that plaintiff has failed to introduce any evidence into the record which would support a prima facie case of age discrimination. The record indicates that when defendant lost its manufacturing contract with Delco it suffered a major loss on the manufacturing side of its business. As a result, defendant reduced and restructured its management and labor forces. Defendant contends that plaintiff's position as a manufacturing manager became unnecessary due to the reduction in its manufacturing business, and that he was discharged simply because his position was eliminated pursuant to the reorganization.

Holley v. Sanyo Manufacturing, Inc., 771 F.2d 1161 (8th Cir. 1985) holds that in order to support a prima facie case of age discrimination in a reduction of work force situation the plaintiff must produce, *inter alia*, evidence indicating that age was a factor in his termination. *Id.* at 1166.

> The ADEA does not require that every plaintiff in a protected age group be allowed a trial simply because he was discharged during a reduction-in-force. . . . "[T]he mere termination of a competent employee when an employer is making cutbacks due to economic necessity is insufficient to establish a prima facie case of age discrimination" and . . . the "plaintiff in such cases must come forward with additional evidence that age was a factor in his termination in order to establish a prima facie case."

Id. at 1165-66, *quoting LaGrant v. Gulf and Western Manufacturing Co., Inc.*, 748 F.2d 1087, 1090-91 (6th Cir. 1984).

This further showing may take the form of direct, statistical or circumstantial evidence. *Id.* at 1166.

Plaintiff has asserted no facts which suggest that age was a factor in plaintiff's discharge and which, under Rule 56(e), would put into issue defendant's evidence that plaintiff was non-discriminatorily discharged pursuant to a reduction-of-force at M-Tron. Therefore, summary judgment in favor of the defendant is appropriate on count one.

II. IMPLIED DUTY OF GOOD FAITH

South Dakota does not recognize an implied duty of good faith in the employment context. *See Cutter v. Lincoln National Life Ins. Co.*, 794 F.2d 352, 356 (8th Cir. 1986); *Hopes v. Black Hills Power and Light Co.*, 386 N.W.2d 490, 491 (S.D. 1986); *Tombollo v. Dunn*, 342 N.W. 2d 23, 25-26 (S.D. 1984). Therefore, plaintiff's count two fails to state a cause of action and summary judgment shall be granted thereupon.

III. BREACH OF YEAR-TO-YEAR CONTRACT

In June of 1975 plaintiff was hired by defendant as Director of Manufacturing. Plaintiff was specifically informed by defendant at this time, in writing, that there was no employment contract. In November of 1976 plaintiff signed a contract expressly agreeing to "employment at will and not for any stated period of time." Plaintiff was elected by the Board of Directors Vice President of Manufacturing in 1977 and Vice President of Operations in 1978. On March 5, 1984 plaintiff was elected Vice President-Manufacturing Manager, at an annual salary

of $40,500 to commence June 1, 1984. The corporate by-laws specifically state that corporate officers may be removed, with or without cause, at any time. On June 12, 1984 plaintiff was terminated.

S.D.C.L. § 60-1-3 states: "An employee is presumed to have been hired for such length of time as the parties adopt for the estimation of wages. A hiring at a yearly rate is presumed to be for one year. . . ." In this case plaintiff was hired at a yearly rate; nevertheless, the presumption that he was hired for a specified one-year term is overcome by the express agreement between the parties that plaintiff was an employee at will hired for no specified term. In this case the written agreement for employment at will defeats the presumption of S.D.C.L. § 60-1-3, and plaintiff's claim under this section is without merit.

IV. VIOLATIONS OF CORPORATE BY-LAWS

Plaintiff alleges that under defendant's corporate by-laws he, as a corporate officer, could be removed only by a majority vote of the Board of Directors. Plaintiff contends that this was not done and that, therefore, his discharge by defendant was wrongful. The Court will entertain this claim, which was not formally pled, under Fed. Rule Civ. Pro. 15(b).

The By-Laws of Lynchtron, Inc. at Article V, section 2 state:

> *Term.* . . . Any officer elected or appointed by the Board of Directors may be removed, with or without cause, at any time by a majority vote of the directors then in office.

At the time of plaintiff's termination, there were four members of the Board of Directors: Charles Ehinger, Martin Kiousis, Richard Sprigle and John Morris. Ehinger, Kiousis and Morris discussed the prospect of plaintiff's severance and agreed to his termination. *See* Affidavit of John B. Morris at paragraphs 5 and 6. Plaintiff has made no showing under Rule 56(e) which would put this issue into dispute. Since plaintiff's termination was agreed to by a majority of the Board of Directors of M-Tron, his fourth ground for relief based on violation of the corporate by-laws of defendant is without merit.

V. CONCLUSION

Plaintiff was an employee at will of defendant. His claims of wrongful discharge under ADEA, implied duty of good faith, S.D.C.L. § 60-1-3 and the M-Tron by-laws are supported by no genuine issue of material fact; therefore, defendant is entitled to judgment on all counts as a matter of law.

ORDER

Now, therefore,

IT IS ORDERED:

(1) That summary judgment is granted in favor of the defendant on all counts herein.

(2) That this action is dismissed with prejudice.

Dated this 19th day of November, 1986.

/s/ John B. Jones
United States District Judge

ATTEST:

WILLIAM F. CLAYTON, CLERK
BY: /s/ Linda M. Ziegler
Deputy

(SEAL)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 86-5481

Ernest Hillebrand, Appellant,	)
v.	) Appeal from the United States District Court of South Dakota.
M-Tron Industries, Inc., a South Dakota Corporation, Appellee.	)

Submitted: June 11, 1987

Filed: August 27, 1987

Before LAY, Chief Judge, HEANEY, Circuit Judge, and LARSON,* Senior District Judge.

LAY, Chief Judge.

This is an age discrimination case brought under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-34 (1982) (ADEA). Suit was brought by Ernest Hille-

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*The HONORABLE EARL R. LARSON, Senior United States District Judge for the District of Minnesota, sitting by designation.

brand, an executive vice president of M-Tron Industries, Inc. (M-Tron) located in South Dakota. After extensive discovery, M-Tron moved for, and was granted, summary judgment on the grounds that Hillebrand had failed to make a prima facie case under the requirements of *Holley v. Sanyo Mfg., Inc.*, 771 F.2d 1161 (8th Cir. 1985).[1] In addition, the trial court, the Honorable John B. Jones, presiding, granted M-Tron summary judgment on two state law claims.[2] We affirm the grant of summary judgment on the two state counts but remand for plenary trial Hillebrand's claim under the ADEA.

Before beginning our discussion of the facts of this case, because of the summary disposition by the district court, we reiterate what has been stated by this court for a number of years: Summary rulings are the direct antithesis of the full and fair process found in an adver-

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[1]In *Holley* we held that in an ADEA case involving a "reduction in force" a plaintiff must show at the prima facie stage, in addition to the facts, that he was in the protected age group, that he was qualified, that he was discharged, and that age was a factor in the employer's decision. 771 F.2d at 1165-66.

[2]In the state claims, Hillebrand pled that he was an at-will employee and therefore could not be discharged without cause. He claimed that the South Dakota statute imposed on employers a standard of good faith dealing. S.D. Codified Laws Ann. ch. 60-1. He asserts his proof establishes a breach of good faith. We have recently held that our interpretation of South Dakota law does not recognize a private cause of action under this statute. *See Cambee's Furniture, Inc. v. Doughboy Recreational, Inc.*, No. 86-5325 (8th Cir. July 22, 1987). He pled alternatively that if he were not an employee at-will, he still has another state claim. That second claim was premised on the allegation that Hillebrand was not an at-will employee, even though he had signed an agreement with M-Tron stating that he was an at-will employee, hired for no specific term. His claim as one other than an employee at-will cannot be sustained.

sary proceeding. *See, e.g., Hartford Accident and Indem. Co. v. Stauffer Chem. Co.*, 741 F.2d 1142, 1144 (8th Cir. 1984); *Jensen v. Klecker*, 648 F.2d 1179, 1182 (8th Cir. 1981) (per curiam); *Minnis v. International Union, United Auto, Aerospace and Agric. Implement Workers of Am., UAW*, 531 F.2d 850, 854 (8th Cir. 1975). Summary judgments should be sparingly used and then only in those rare instances where there is no dispute of fact and where there exists only one conclusion.[3] Summary judgments should seldom be used in cases alleging employment discrimination because of the special category in which Congress and the Supreme Court visualized these cases. Knowing that discrimination is difficult to prove by direct evidence, the Supreme Court has interpreted employment discrimination cases as requiring simplified proof from a claimant in order to create an inference of discrimination and thereby establish a prima facie case. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). Once the inference is created, the law is clear that the burden of production is placed on an employer to show a non-discriminatory reason. The plaintiff may

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[3]*Holley* itself exalted this rule. In that case we said:

> We may find for Sanyo only if "all the evidence points one way and is susceptible of no reasonable inferences sustaining the position" of Holley. Further, we must assume as true all facts in Holley's favor which the evidence tends to prove and give him the benefit of all reasonable inferences. The task before us is, bearing in mind this standard, to adduce the nature of proof required under the ADEA and to evaluate the evidence Holley presented at trial against such requirements.

Holley, supra, 771 F.2d at 1164 (citations omitted).

then rely on his prima facie case or go further and attempt to show the defendant's reasons were pretextual. *See Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981); *Wells v. Gotfredson Motor Co., Inc.*, 709 F.2d 493, 495 (8th Cir. 1983).

In the present case, the trial court held that the extreme remedy of summary judgment was required. In doing so the judge should have viewed all of the facts in the light most favorable to the party opposing the motion, giving that party the benefit of all reasonable inferences to be drawn from those facts. *See supra* note 3. We are convinced that he failed to do so. The trial court became persuaded that Hillebrand was discharged as part of a reduction in force by the employer. Having made that determination, the court then applied *Holley* and reasoned that Hillebrand lacked a showing of proof demonstrating that age was a factor in his termination.

Here Hillebrand urges that the proffered reason for his discharge, i.e. reduction in the work force, was itself pretextual. Thus, Hillebrand joined issue on the very facts that the trial court found to be the non-discrinimatory reason for his discharge.[4] In proving a prima facie case, the plaintiff is not required to adopt as part of his case the reason given by the employer as to the discharge. After a full trial weighing the credibility of the witnesses, the fact finder, jury or judge, might find that the overall evidence supported the employer's case thereby negating

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[4]In *Holley* the existence of a reduction in force was unquestionably established: More than fifty percent of the employees were laid off, including one-fourth of the salaried employees in Holley's department. *Holley, supra*, 771 F.2d at 1163.

the plaintiff's proof of discrimination. On the other hand, the plaintiff's proof may well convince the factfinder that the employer's reason was pretextual and that the plaintiff's prima facie proof sustained the case.

We now turn to the facts revealed by the various depositions and affidavits filed with the motion for summary judgment.

Facts

M-Tron designs, manufactures, and distributes radio crystals. In recent years, it has also begun buying foreign-made crystals and distributing them in the United States. From 1977 to 1984, Delco Electronics was a major account of M-Tron. Because of problems in production and shipping, Delco had shown signs of dissatisfaction with its contract with M-Tron. On May 14, 1984, Kiousis, then president of M-Tron, wrote a memorandum discussing the effect of losing the Delco contract. At that time he noted that "[t]he forecast without Delco [was] higher than the original 1985 forecast which included Delco." From 1975 to 1984, Hillebrand was employed at M-Tron in various management and executive positions, including manufacturing manager, vice president-operations, and vice president-production. On May 16, 1984, notwithstanding the projected loss of the Delco contract, Hillebrand was reelected by M-Tron's board of directors as the vice president-operations. On May 29, 1984, Kiousis wrote Delco acknowledging the non-renewal of the Delco contract, but anticipating further Delco business. On June 5, 1984, Kiousis expressed optimism for M-Tron despite the loss of the contract. He projected the discharge of some in-

direct personnel but made no reference to top level management. In that same memorandum, Kiousis projected the need for additional personnel for clock production, engineering and new product development.

Kiousis wrote a letter terminating Hillebrand on June 8, 1984, and stated that he was being discharged due to the loss of the Delco contract. As vice president-operations, Hillebrand knew of no plans to fire or lay off anyone prior to that time. He stated that to his knowledge, no general reduction in force had been planned or implemented. M-Tron has maintained throughout that the loss of the contract so reduced its manufacturing demands that it could not justify an executive level manufacturing position. M-Tron also claims that during the past several years it has been in the process of phasing down its manufacturing capacities and turning more to importing crystals from Japanese manufacturers. There is no claim by M-Tron that Hillebrand was incompetent or unqualified. M-Tron also points out that some ninety other employees were laid off in the ten months following the loss of the Delco contract. It concedes that none were top executives such as Hillebrand, but states that some were managers and supervisors, and many were production and line personnel. No top administrative level employee other than Hillebrand, however, was discharged in 1984.

Hillebrand's proof presents a different view of M-Tron's decision to discharge him. He relies largely on the chronology of events leading up to the discharge to establish an inference of age discrimination. First, he claims that Kiousis and Rein, M-Tron's treasurer, were planning his discharge months before the Delco contract

was cancelled and at a time when Delco's business with M-Tron was actually increasing. Hillebrand asserts that Rein, the company comptroller, initially brought up Hillebrand's "questionable usefulness" to the company in early 1983. It was Rein who assumed Hillebrand's responsibilities even though he had no previous training which would qualify him to do so. In September of 1982 Rein prepared a contingency plan to reduce costs should the then-existing downturn in the crystal market continue. In the memorandum of that plan, he called for the elimination of eight salaried personnel along with other cost-cutting measures. These positions were in fact not eliminated until nine months after Hillebrand's discharge. Hillebrand's position was not identified as one to be eliminated.

In late 1983 Kiousis outlined a general plan for reducing expenses in the event the Delco contract was lost. Eleven "indirect labor" positions were targeted for elimination, but none of the positions were named. Hillebrand received his termination notice in mid-June when he returned from vacation. He was given severance pay and vacation time and was offered an additional $5000 if he would sign a general release absolving M-Tron from any future liability.[5] He refused to sign. His duties were combined with Rein's, who was forty years old at the time.[6]

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[5]A general release of a Title VII or ADEA claim does not ordinarily violate public policy and is enforceable absent force, fraud, or undue influence. *Pilon v. University of Minn.*, 710 F.2d 466, 468 (8th Cir. 1983); *see also Sherrod v. Sears, Roebuck & Co.*, 785 F.2d 1312, 1315 n.8 (5th Cir. 1986).

[6]The ADEA protects individuals who are at least forty but less than seventy years of age. 29 U.S.C. § 631(a) (1982). Rein

(Continued on following page)

Rein stated that he was not experienced in manufacturing or plant operations and that his expertise was in the financial area.

Hillebrand also points to a statement Kiousis made at an awards banquet, where he referred to Hillebrand as "a gray-haired old man," as further evidence that age was behind the decision to fire him. In addition he relies on an indirect statement made by Kiousis in his deposition that by January of 1984 Hillebrand had "outlived his usefulness."

Discussion

Hillebrand maintains that this evidence viewed as a whole creates a prima facie inference that M-Tron's officials fired him because of his age. Hillebrand was sixty years old at the time of his discharge. M-Tron does not dispute that Hillebrand was in the protected age group, that he was qualified, that he was performing his job duties satisfactorily, that he was discharged, and that his duties were assumed by a younger man. The company claims, however, that the evidence fails to establish a question of material fact on the issue of whether age was a factor in the company's employment decision, a required element in an ADEA/reduction in force case under *Holley*. Hillebrand maintains that *Holley* does not apply in this

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(Continued from previous page)

therefore, was also in the protected age group. A plaintiff need not be replaced by a person outside the protected age group to make out a prima facie case under the ADEA; the plaintiff need only be replaced by a younger person. *See, e.g., Thornbrough v. Columbus and Greenville R.R. Co.*, 760 F.2d 633, 643 n.14 (5th Cir. 1985); *Pace v. Southern Ry. Sys.*, 701 F.2d 1383, 1386-87 (11th Cir.), *cert. denied*, 464 U.S. 1018 (1983).

case because there was no bona fide reduction in force at the company that would trigger *Holley's* more rigorous standards at the prima facie stage. The facts of this case parallel those found in *Christie v. Foremost Ins. Co.*, 785 F.2d 584 (7th Cir. 1986). A jury found that the defendant's proffered reason for firing the plaintiff was pretextual. The defendant contended that its nondiscriminatory reason for firing him was a cutback necessitated by an economic downturn. Christie claimed that the reason was pretextual because there was no bona fide reduction in force. The court addressed this attack on the genuineness of the employer's claimed reduction in force:

> Christie also presented evidence from which the jury could have found that Foremost did not comply with its own reduction in force policy * * *.
>
> * * *
>
> * * * Foremost alleges that rather than producing evidence of pretext, Christie merely invited the jury to second-guess Foremost's business judgment. Foremost is correct that a plaintiff cannot argue that the defendant made a bad business decision in choosing between two employees to discharge. * * *
>
> Christie's argument was different, however. He argued not that Foremost used the wrong criteria and bad judgment in terminating him as part of a reduction in force, but rather *that Foremost never made a decision about who to terminate as part of a reduction in force. Christie argued that Foremost merely used the reduction-in-force rationale as a pretext to cover age discrimination.* A plaintiff cannot argue that the defendant showed bad judgment in deciding another employee had greater potential, but he can argue that the method used by the defendant showed that the defendant was not really trying to decide which em-

> ployee had greater potential. Granted this is a fine line, but the law often places such a burden on the jury.

Id. at 587 (emphasis added).

Christie is distinguishable, of course, because the prima facie case was not at issue. The claimed reduction in force in the instant case undoubtedly will be a recurring issue at trial. M-Tron will continue to assert that the reduction in force was the legitimate reason for firing Hillebrand, and Hillebrand will try to show that the reduction in force, and therefore the legitimate business reason, was pretextual. Our holding that the evidence adduced thus far tends to disprove the existence of a genuine reduction in force goes only to the issue of the proper analytical framework of a prima facie case. The case has progressed only to the point of the defendant's motion for summary judgment. It is likely that both parties will produce additional evidence at trial in support of their respective claims. Our opinion should not be read as deciding the ultimate issue of pretext, for it does not.

Most cases simply assume that a reduction in force has occurred and analyze the evidence within that framework. Cf. *Holley, supra*, 771 F.2d 1161. When this occurs, the evidence generally demonstrates that the company had some kind of plan to reduce expenses by eliminating jobs. These plans generally include objective criteria by which to determine which jobs will be eliminated and often include objective evidence of a business decline. *See, e.g., Nolting v. Yellow Freight Sys., Inc.*, 799 F.2d 1192, 1194 (8th Cir. 1986) (disparate impact ADEA case involving nationwide reduction in force); *Holt v. Gamewell Corp.*, 797 F.2d 36, 37 (1st Cir. 1986) (three years of net operat-

ing losses); *Fink v. Western Elec. Co.*, 708 F.2d 909, 911 (4th Cir. 1983) (entire unit eliminated after government contract cancelled). Often a company will factor into its reduction in force plan the effect of layoffs on protected groups. *See EEOC v. Sandia Corp.*, 639 F.2d 600, 603 (10th Cir. 1980) (plan examined and approved by Department of Labor and EEOC). As part of this objective approach, some companies use committees to make the final decision on who will lose their jobs. *Fink v. Western Elec. Co.*, 708 F.2d at 909-10; *EEOC v. Sandia*, 639 F.2d at 604. Apparently this is done to insulate employees from possible biases or prejudices of immediate supervisors and to protect the employer in any subsequent discrimination lawsuits.

There exists little evidence of M-Tron's objective plan to reduce expenses at the time of Hillebrand's discharge, nor is there much evidence of a genuine business decline. Kiousis' and Rein's contingency plans neither identified the targeted positions nor described an objective plan. Further, Kiousis' memorandum of May 14 forecasted a better profit picture without the Delco contract than with it, evidence that militates against M-Tron's claim of a genuine business decline. Additionally, Kiousis' June 5 memorandum discussing the termination of nine indirect employees and the anticipated personnel buildup in clock production, engineering, and new product development, suggests that the company was not in the dire economic straits it now alleges. It also seems unusual that the vice president-operations would not know of a planned reduction in force. Apparently only Kiousis and Rein knew of the alleged reduction in force at the time Kiousis fired Hillebrand. When viewed as a whole, the record supports

Hillebrand's claim that there was no genuine reduction in force that would trigger the more exacting standards of *Holley* in order to overcome a motion for summary judgment. The district court's reliance on *Holley,* therefore, was erroneous.

We have previously held that the prima facie formula first articulated in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973), is not exclusive and its application will vary in different fact situations. *Legrand v. Trustees of University of Ark.,* 821 F.2d 478, 480 (8th Cir. 1987) (Title VII); *Leichihman v. Pickwick Int'l,* 814 F.2d 1263, 1269 (8th Cir. 1987) (ADEA). The particular allegations and facts in a case will determine the appropriate legal framework at the prima facie stage. The significance of the prima facie showing is the inference it creates that the plaintiff was discharged for a discriminatory reason.

We conclude that, as a matter of law, Hillebrand has established a prima facie case of age discrimination. The cause is remanded to the district court for a plenary trial on the ADEA count.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 86-5481SD

Ernest Hillebrand,	•	
	•	
Appellant,	•	Appeal from the
	•	United States
vs.	•	District Court for
	•	the District of
M-Tron Industries, Inc., etc.,	•	South Dakota
	•	
	•	
Appellee.	•	
	•	

Appellee's petition for rehearing en banc has been considered by the Court and is denied.

Judges John R. Gibson, Fagg, Bowman and Magill would have granted the petitions.

Petition for rehearing by the panel is also denied.

November 18, 1987

Order entered at the Direction of the Court:

ROBERT ST. VRAIN
Clerk, U. S. Court of Appeals, Eighth Circuit.

(2)

Supreme Court, U.S.
FILED
MAR 16 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1420

In The

Supreme Court of the United States

October Term, 1987

M-TRON INDUSTRIES, INC.,

Petitioner,

vs.

ERNEST HILLEBRAND,

Respondent.

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

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March, 1988

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PRELIMINARY STATEMENT

Respondent adopts Petitioner's references to Opinions Below, Jurisdiction and Statutory Provisions Involved, and references herein to the appendix to Petitioner's Petition and Brief will be designated by parenthetical "J.A.", followed by its page number.

STATEMENT OF THE CASE

Respondent does not agree with factual representations and conclusions contained in Petitioner's Statement Of The Case.

The Court of Appeals reviewed the appeal record, including depositions and affidavits, together with appeal briefs and arguments presented by the parties. Predicated upon that record, the Court of Appeals set forth the ultimate facts upon which it relied in its August 27, 1987 Decision (J.A. 12-15). In the interests of brevity, Respondent relies upon the factual presentation contained in the referenced decision. Conflicts between factual representations made by Petitioner and by the Appeals Court are quite apparent.

ARGUMENT

Certiorari should not be granted in this case for the following reasons:

1. Petitioner has predicated its argument for Certiorari upon an unreasoneble and unjustifiable interpretation of the facts reviewed by the Appeals Court.

That Court specifically identified facts upon which it relied to determine: (1) that Respondent had established a prima facie case of age discrimination; and (2) that there was substantial evidence to support Respondent's claim that Petitioner's defense of "reduction in force" was pretextual.

2. The decision of the Court of Appeals carefully sets forth the rationale upon which the Court relied to distinguish the instant case from its previous decision in *Holley v. Sanyo Mfg.*, 771 F.2d 1161 (8th Cir. 1985). That Court observed that this case differs from *Holley* and other age discrimination cases involving reduction in force plans in that the appeal record herein disclosed substantial and significant evidence from which it could be concluded that Petitioner's defense was, in fact, pretextual. Whereas, in *Holley* and other similar cases, the defendant employer had established a well-defined reduction in force plan, and established a reason therefore. The Appeals Court neither altered the order of proof applicable to employment discrimination claims, nor did it tamper with rationale established by it and other appeals courts relating to true reduction in force cases. The contention by Petitioner that the decision of the Appeals Court "effectively eliminates the ability of a defendant employer in a discrimination action to obtain summary judgment", is neither supported by the decision itself nor by the record upon which it is predicated. To the contrary, after having recited facts which strongly support a prima facie case of age discrimination, (J.A. 14-15), the Court emphasized that the more exacting standards of *Holley* required to overcome a motion for summary judgment

were not appropriate in this case, when it said at (J.A. 18-19):

> . . . when viewed as a whole, the record supports Hillebrand's claim that there was no genuine reduction in force that would trigger the more exacting standards of *Holley* in order to overcome a motion for summary judgment. The District Court's reliance upon *Holley*, therefore, was erroneous.
>
> We have previously held that the prima facie formula first articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), is not exclusive and its application will vary in different fact situations. *Legrand v. Trustees of University of Ark.*, 821 F.2d 478, 480 (8th Cir. 1987) (Title VII); *Leichihman v. Pickwick Int'l*, 814 F.2d 1263, 1269 (8th Cir. 1987) (ADEA). The particular allegations and facts in a case will determine the appropriate legal framework at the prima facie stage. The significance of the prima facie showing is the inference it creates that the plaintiff was discharged for a discriminatory reason.

3. The Court of Appeals consistently applied well-established standards for summary judgment, and there is no justification for the argument by Petitioner that by its decision it created confusing precedent. Likewise, there is no justification or support for the claim by Petitioner that the decision of the Appeals Court is in conflict with decisions of this Court and other Circuits regarding the availability of summary judgment. In this regard, it is difficult to understand Petitioner's reference to *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), which are not employment discrimination cases, and involve standards for

summary judgment which are somewhat remote from standards applicable to this case.

CONCLUSION

The issues inherent in this case do not rise to the significance and importance of issues appropriate for consideration by this Court. The case at bar involves an ordinary age discrimination claim, and, as observed by the Court of Appeals, the record contains evidence of age discrimination which transcends a bare prima facie showing. Accordingly, Petition For Writ Of Certiorari should be summarily denied.

Respectfully submitted,

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Dated this 16 day of March, 1988.